No. 19-2546

United States Court of Appeals
for the
Seventh Circuit

ERIC WHITE,

Plaintiff-Appellant,

– v. –

UNITED AIRLINES, INC., *et al.*,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, NO. 1:19-CV-00114
THE HONORABLE CHARLES R. NORGLE

BRIEF FOR *AMICI CURIAE* AIR TRANSPORT ASSOCIATION OF AMERICA, INC., d/b/a AIRLINES FOR AMERICA AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLEES

PATRICIA N. VERCELLI
RIVA PARKER
AIRLINES FOR AMERICA
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-4000

Counsel for Air Transport Association of America, Inc., d/b/a Airlines for America

DARYL L. JOSEFFER
EMILY J. KENNEDY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

MARK W. ROBERTSON
ANTON METLITSKY
O'MELVENY & MYERS LLP
7 Times Square
New York, New York 10036
(212) 326-2000

JASON ZARROW
O'MELVENY & MYERS LLP
400 South Hope Street, 18th Floor
Los Angeles, California 90071
(213) 430-6005

Counsel for Amici Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2546

Short Caption: White v. United Airlines, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Air Transport Association of America, Inc. d/b/a Airlines for America; The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Anton Metlitsky Date: 6/22/2020

Attorney's Printed Name: Anton Metlitsky

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

Address: 7 Times Square

New York, New York 10036

Phone Number: 212 326 2291 Fax Number: 212 326 2061

E-Mail Address: ametlitsky@omm.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2546

Short Caption: White v. United Airlines, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Air Transport Association of America, Inc. d/b/a Airlines for America; The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Mark Robertson Date: 6/23/2020

Attorney's Printed Name: Mark Robertson

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 7 Times Square

New York, New York 10036

Phone Number: 212 326 4329 Fax Number: 212 326 2061

E-Mail Address: mrobertson@omm.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2546

Short Caption: White v. United Airlines, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Air Transport Association of America, Inc. d/b/a Airlines for America; The Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

Attorney's Signature: /s/ Jason Zarrow Date: 6/23/2020

Attorney's Printed Name: Jason Zarrow

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 400 S. Hope Street, 18th Floor

Los Angeles, California 90071

Phone Number: 213 430-6005 Fax Number: 213 430 6407

E-Mail Address: jzarrow@omm.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2546

Short Caption: White v. United Airlines, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Air Transport Association of America, Inc., d/b/a Airlines for America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Patricia N. Vercelli Date: 6/23/2020

Attorney's Printed Name: Patricia N. Vercelli

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 1275 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Phone Number: 202 626 4000 Fax Number:

E-Mail Address: pvercelli@airlines.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2546

Short Caption: White v. United Airlines, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Air Transport Association of America, Inc., d/b/a Airlines for America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Riva Parker Date: 6/23/2020

Attorney's Printed Name: Riva Parker

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 1275 Pennsylvania Avenue, N.W.

Washington, D.C. 20004

Phone Number: 202 626 4000 Fax Number:

E-Mail Address: rparker@airlines.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2546

Short Caption: White v. United Airlines, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Daryl L. Joseffer Date: 6/23/2020

Attorney's Printed Name: Daryl L. Joseffer

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 1615 H Street, N.W.

Washington, D.C. 20062

Phone Number: 202 463 5337 Fax Number: 202 463 5346

E-Mail Address: DJoseffer@USChamber.com

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 19-2546

Short Caption: White v. United Airlines, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statements be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in the front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

☐ **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3):

Chamber of Commerce of the United States of America

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

O'Melveny & Myers LLP

(3) If the party, amicus or intervenor is a corporation:

i) Identify all its parent corporations, if any; and

N/A

ii) list any publicly held company that owns 10% or more of the party's, amicus' or intervenor's stock:

N/A

(4) Provide information required by FRAP 26.1(b) – Organizational Victims in Criminal Cases:

N/A

(5) Provide Debtor information required by FRAP 26.1 (c) 1 & 2:

N/A

Attorney's Signature: /s/ Emily Kennedy Date: 6/23/2020

Attorney's Printed Name: Emily Kennedy

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☐ **No** ☑

Address: 1615 H Street, N.W.

Washington, D.C. 20062

Phone Number: 202 463 5337 Fax Number: 202 463 5346

E-Mail Address: EKennedy@USChamber.com

RULE 26.1 DISCLOSURE STATEMENT

Air Transport Association of America, Inc., d/b/a Airlines for America, has no parent corporation and does not issue stock. No publicly held company owns more than 10% of Airlines for America.

The Chamber of Commerce of the United States of America has no parent corporation and does not issue stock. No publicly held company owns more than 10% of the Chamber.

Dated: June 22, 2020

/s/ Anton Metlitsky
Anton Metlitsky

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Rules and Regulations

Other Authorities

INTEREST OF AMICI CURIAE[1]

Airlines for America (A4A) is the nation's oldest and largest airline trade association, representing passenger and cargo airlines throughout the United States. A4A works to foster a business and regulatory environment that ensures a safe, secure, and healthy U.S. air transportation industry—including stable and predictable legal rules to govern it. Thus, throughout its 75-plus year history, A4A has been actively involved in the development of the federal law applicable to commercial air transportation.

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of vital concern to the Nation's business community.

For decades, Congress has regulated the employment and reemployment rights of service members. And it has always been understood—by the business community, by labor groups, and even by the federal agencies that administer these laws—that Congress has never required employers to provide paid military leave to

[1] Both parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than *amici*, their members, or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

reservists. Under Plaintiff's interpretation of the Uniformed Service Employment and Reemployment Rights Act (USERRA), however, that understanding, which has stood for 80 years, would be upended. *Amici*'s members would now be required to provide paid military leave simply because they also provide paid jury duty and sick leave. That would impose a significant financial obligation on air carriers, who proudly employ thousands of reservists—and indeed, on all employers that employ reservists in substantial numbers, including federal, state, and local governments. It would also be devastating for small businesses that can ill afford to pay people not to work, potentially for extended periods of time during which the reservists are also paid by the military. The district court correctly recognized that, had Congress intended that result, it would have said so expressly. *Amici* have a keen interest in defending that decision.

INTRODUCTION AND SUMMARY OF ARGUMENT

"Enacted in 1994, USERRA is the most recent iteration of a series of laws dating back to 1940 intended to protect the employment and reemployment rights of members and former members of the armed forces." *Gross v. PPG Indus., Inc.*, 636 F.3d 884, 888 (7th Cir. 2011). Although the statute is meant to benefit service members, "Congress carefully constructed" it also to account for "the legitimate concerns of employers." *Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304-05 (4th Cir. 2006).

At issue here is 38 U.S.C. § 4316(b), the USERRA provision that entitles service members on military leave to the same non-seniority rights and benefits as are generally provided to non-military employees during a comparable "furlough or

leave of absence." Its command is simple: if an employee gets a benefit during a non-military leave of absence that is comparable to military leave, she must also get that benefit during military leave. Applying § 4316(b) to this case is also simple. As United explains, wages themselves are not USERRA benefits, *see* United Br. 22-31, so the only benefit Plaintiff is seeking here is paid military leave. But since United (obviously) does not provide that benefit to its employees on civilian leave, Plaintiff is not entitled to that benefit under § 4316(b). *Id.*

According to Plaintiff, however, the statute is far broader, requiring employers who provide short-term paid leaves (such as paid jury duty or sick leave) also to provide paid military leave. Congress accomplished that goal, Plaintiff contends, through the combination of (i) § 4316(b), which requires employers to provide employees on military leave the same "rights and benefits" as employees receive on comparable non-military leaves, and (ii) USERRA's definition of "benefits," which Plaintiff believes includes "paid leave." United persuasively explains why that construction is irreconcilable with the statute's text, history, and structure. *See* United Br. 22-31. This brief focuses on three points.

First, Plaintiff misconstrues both § 4316(b)'s text and *Waltermyer v. Aluminum Co. of America*, 804 F.2d 821 (3d Cir. 1986), on which § 4316(b) was based. That case does not hold that an employer that provides paid civilian leaves must also provide paid military leave. Rather, *Waltermyer* holds that when an employer provides an additional benefit during a civilian leave—there, holiday pay—it must provide that same benefit to employees taking military leave. That

rule does not apply here for the reasons explained above. Indeed, *Waltermyer* expressly declined to adopt the rule that Plaintiff advances—it recognized that the employees there received full pay during jury duty but did *not* hold that they must also receive full pay during military leave. Section 4316(b) was intended to adopt *Waltermyer*; there is no basis to conclude that the 1994 Congress meant to expand that decision.

Second, Plaintiff's position is inherently implausible. If his construction of § 4316(b) were correct, USERRA would have represented a dramatic departure from several critical aspects of the then-existing regulatory scheme, and in a way that imposed substantial practical consequences on numerous stakeholders—yet it would have done so silently. The existing legal regimes Plaintiff's construction would upend are discussed in detail below, but to take one example, USERRA applies to the federal government, which provides its employees paid jury duty and sick leave, but also provides—expressly and independent of USERRA—up to 15 days of paid military leave. Under Plaintiff's theory, the federal government would often be required to provide paid military leave far in excess of 15 days, rendering the entire federal scheme superfluous because paid military leave would be fully available under USERRA.

The consequences of Plaintiff's reading would be similarly stark for private employers who employ a large number of reservists or have only a few employees. Many reservists take significant amounts of military leave on an annual basis—far more than any worker could take for sickness or jury duty. Plaintiff's rule would

require any employer that offers paid sick leave or paid jury duty leave (which is to say, virtually everyone) to pay for all of that military leave—without even a setoff for the substantial pay that reservists get from the military. This dramatic financial consequence would force many employers to choose between rescinding the paid jury duty, sick leave, or similar benefits they offer, or offering paid military leave. Airlines would be especially hard hit because a substantial percentage of their pilots are also reservists, who are well paid and take significant amounts of military leave every year.

Had Congress intended USERRA to have such a substantial legal and practical effect, one would expect that *someone* would have said *something* about it. Presumably Congress would have made Plaintiff's rule explicit in the text, because Congress normally does not make dramatic changes to existing regulatory schemes implicitly. At the very least, the legislative history would have mentioned the new rule Plaintiff advances. And the stakeholders who would be severely impacted by this supposed change in law—whether it be the business community, labor unions, companies in other fields, or federal or state governments—no doubt would have made their views known and sought to affect the legislation one way or the other. Yet not only does the text lack any explicit statement adopting Plaintiff's rule, but not a single Member of Congress or stakeholder even identified—let alone

supported or opposed—the reading Plaintiff presses this Court to adopt. It is implausible to suggest that such a drastic change went unnoticed.

Third, Plaintiff mistakenly contends that any possible textual ambiguity in USERRA should be interpreted in a reflexively pro-employee manner. There is no such ambiguity here, and Plaintiff's position is wrong in any event—the pro-veteran canon is a rule of last resort that yields to other canons of interpretation, including the clear statement rules that preclude Plaintiff's construction here.

ARGUMENT

I. PLAINTIFF'S POSITION IS INCONSISTENT WITH § 4316(b)'s TEXT AND WITH *WALTERMYER*

Plaintiff contends that "paid leave" is a "benefit" under 38 U.S.C. § 4303(2), and that because United provides employees paid civilian leaves like jury duty and sick leave, § 4316(b) also requires United to provide paid military leave. As United persuasively demonstrates, *see* United Br. 22-23, however, "paid leave" is not itself a benefit but rather a generic *category* that describes different *types* of benefits, including (for example) paid jury duty leave, paid sick leave, paid military leave, *see* *Pucilowski v. Dep't of Justice*, 498 F.3d 1341, 1344 (Fed. Cir. 2007), or "vacations," 38 U.S.C. § 4303(2). Moreover, Plaintiff misunderstands how § 4316(b) works. While various types of paid leave can be "benefits" under USERRA, § 4316(b) protects "*other* rights and benefits," *id.* § 4316(b) (emphasis added)—that is benefits other than "leaves of absence," *id.*—that employers provide *during* civilian leaves. In other words, if an employer provides an additional benefit during a civilian

"leave of absence" comparable to military leave, then it must provide that same benefit to employees during military leaves. *See id.*

That rule does not help Plaintiff, because as courts have routinely recognized, "paid military leave"—not paid leave generically—is the relevant benefit. *See Pucilowski*, 498 F.3d at 1344; *Gordon v. Wawa, Inc.*, 388 F.3d 78, 82 (3d Cir. 2004); *United States v. Missouri*, 67 F. Supp. 3d 1047, 1051 (W.D. Mo. 2014). And paid military leave is "an additional benefit not available to non-military employees." *Welshans v. U.S. Postal Serv.*, 550 F.3d 1100, 1104 (Fed. Cir. 2008) (emphasis added). Thus, for example, the Federal Circuit—which hears the overwhelming majority of veterans' benefits cases—has held that paid military leave is a "benefit of employment" under USERRA, but not a benefit that the Postal Service provided to non-reservist employees, even though non-reservists received paid sick leave. *Id.*[2]; *see also Gross*, 636 F.3d at 889-90 (military leave is a distinct form of benefit not provided to non-military employees). The same is true here. United does not provide civilian employees paid military leave, so UESRRA does not obligate it to provide reservists paid military leave either.

Waltermyer—the case everyone agrees § 4316(b) was enacted to codify—is fully consistent with that conclusion. The relevant benefit in *Waltermyer* was holiday pay (not generic paid leave or wages), and *Waltermyer* held that because the employees of the defendant who were absent for jury duty received holiday pay, an

[2] The Postal Service is excluded from the federal paid military leave requirement in 5 U.S.C. § 6323(a). *See Welshans*, 550 F.3d at 1102-03.

employee absent for military training was likewise required to receive holiday pay. 804 F.2d at 825. Otherwise said, *Waltermyer* simply recognized that if an employer offers a particular benefit to employees during civilian leaves that are comparable to military leave, it must provide that same benefit to reservists during military leave—exactly the rule Congress later adopted in § 4316(b).

Crucially, *Waltermyer* did *not* hold that an employer that provides paid civilian leaves must also provide paid military leave. Indeed, *Waltermyer* expressly *declined* to adopt Plaintiff's theory. *Waltermyer* recognized that employees absent for jury duty were entitled under company policy "to their regular wages in addition to juror fees," yet it did *not* hold that an employer must pay a service member regular wages during military leave if it pays regular wages for jury duty. *Id.* Plaintiff's construction would thus not "affirm the decision in *Waltermyer*." H.R. Rep. No. 103-65(I) (1993), at 33. It would *extend* the decision to encompass a theory that the *Waltermyer* court expressly declined to adopt. There is no basis to "extend the statute well beyond the limits set out" in the seminal case on which it was modeled. *Foster v. Dravo Corp.*, 420 U.S. 92, 99-101 (1975).

II. CONGRESS DID NOT SILENTLY REQUIRE EMPLOYERS THAT PROVIDE PAID CIVILIAN LEAVE ALSO TO PROVIDE PAID MILITARY LEAVE

A. Had Congress Intended To Require Paid Military Leave, It Would Have Legislated Expressly

Certainly, Plaintiff's construction is not clear from the statutory text. After all, Congress knows how to expressly provide for paid military leave, *see* 5 U.S.C. § 6323, but it did not do so here. Plaintiff does not appear to disagree—his

position is that Congress enacted this rule by implication, through the combination of § 4316(b) and USERRA's definition of "benefits." Beyond the text and precedent described above, Plaintiff's position suffers from an additional problem: accepting it would mean that the 1994 Congress enacted a substantial change from the pre-USERRA regulatory scheme in several respects, and imposed significant new obligations on employers of every stripe. But courts have long understood that Congress does not make such changes implicitly. Had Congress intended the kind of substantial departure that Plaintiff posits, it would have done so through express language rather than an "interpretive … bank shot." *Epic. Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626 (2018).

1. *Had Congress Intended To Depart From The Accepted Rule That Paid Military Leave Was Not Required, It Would Have Done So Expressly*

A longstanding principle under USERRA's predecessor statutes was that "the law does not require the employer to pay the employee for the time he is absent for military training duty, or even to make up the difference between his military pay and his regular earnings for that period." *Monroe v. Standard Oil Co.*, 452 U.S. 549, 563 n.14 (1981); *see also* 20 C.F.R. § 1002.2. One reason Congress did not impose such a requirement is that service members are paid for their service. And unlike jury duty, which pays a nominal amount in every jurisdiction, the pay reservists receive for their military service is often greater than what they earn in

their civilian jobs.[3] Congress thus determined that paid military leave was unnecessary. In enacting USERRA, Congress did not depart from the rule that paid military leave is not required: USERRA "does not expressly require paid military leave." *Miller v. City of Indianapolis*, 281 F.3d 648, 650 (7th Cir. 2002); *see* 20 C.F.R. § 1002.7(d).

Plaintiff's position, though, is that Congress *indirectly* required paid military leave when it enacted USERRA—and in particular when it enacted § 4316(b)—so long as the employer also provides any comparable paid leave, such as (according to Plaintiff) paid jury duty or sick leave. But that reading is flatly inconsistent with the rule just described because many states *require* companies to provide paid jury duty leave, sick leave, and the like, and many national companies provide such paid leaves to employees on a uniform national basis. Indeed, state and local laws requiring employers to provide paid absences are ubiquitous:

- 36 states plus the District of Columbia require at least one form of paid absence;
- 13 states plus the District of Columbia require paid sick leave; and
- 9 states plus the District of Columbia require employers to provide jury duty pay.[4]

[3] *See, e.g.*, *Clarkson v. Alaska Airlines, Inc.*, 2:19-cv-0005-TOR, ECF 79-3 at 7 (E.D. Wash.) (plaintiff-service member testimony that his "pay for a day of service with [the] Guard exceeded [his] typical pay for a day of service with Horizon [Airlines]").

[4] *See Travers v. Fed. Exp. Corp.*, 2:19-cv-06106-MAK, ECF 30-3 at 29-62 (E.D. Pa.).

Numerous municipalities likewise require employers to provide various forms of paid leave.[5] Thus, as the district court correctly recognized, Plaintiff's interpretation would create "a de facto rule" that would "swallow" Congress's "previously clear pronouncement" on this issue. *White v. United Airlines, Inc.*, 416 F. Supp. 3d 736, 739 (N.D. Ill. 2019).[6]

This is no small thing. Plaintiff's interpretation would have dramatic and far-reaching consequences—consequences that would not only destroy the well-established background rule that paid military leave is not required, but that would impose tremendous costs on any employer—private or public—who employs reservists. It would be particularly devastating for small employers, who cannot afford to pay workers for prolonged absences, and for large employers that have numerous highly-paid reservists among their ranks.

Airlines provide a prime example. Airlines proudly employ a substantial percentage of commercial pilots who are also reservists—at some A4A member carriers, the figure is upward of 25%. Those pilots are well paid and make up a large percentage of airlines' work force, routinely earning annual salaries of

---

[5] National Partnership for Women & Families (May 2019), http://www.nationalpartnership.org/our-work/resources/workplace/paid-sick-days/paid-sick-days-statutes.pdf.

[6] *Amici* also agree with United that military leave is, as a matter of law, not comparable to jury duty, sick, or bereavement leave. *See* United Br. 42-45. To highlight just one reason: service members often take far more military leave per year, and especially year over year, than anyone could take for jury duty, illness, or bereavement, as the recent USERRA class actions illustrate. *See infra* at n.7.

$100,000 per year or greater. And many pilots take significant amounts of military leave on annual basis, as illustrated in the wave of class actions alleging that airlines violated USERRA.[7] If Plaintiff were right about USERRA, airlines would have to provide a substantial amount of paid military leave, because airlines typically provide their employees with paid jury duty leave, sick leave, and the like.

Had Congress intended these far-reaching consequences, it would have legislated expressly. After all, "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001). This is not a case like *Bostock v. Clayton County*, 2020 WL 3146686 (U.S. June 15, 2020), where Congress enacted broad and express language that compelled the plaintiff's reading. *Id.* at *17. To the contrary, even Plaintiff cannot point to language in USERRA expressly providing for paid military leave; his position is that the combination of § 4316(b) and the definition of "benefits" leads to that result. Moreover, *Bostock* involved a *new* regulatory regime in which Congress used sweeping language. *Id.* (declining to apply no-elephants-in-mouseholes canon for this reason). Here, however, Plaintiff's theory is that Congress *altered* a decades-old rule—that paid military leave is not required—but that it did so impliedly through the combination of 38 U.S.C. §§ 4316(b) and

[7] *See, e.g.*, *Scanlan v. Am. Airlines Grp.*, No. 2:18-cv-04040, ECF 81-3 ¶ 56 (E.D. Pa.) (260 days of military leave in two years); *Travers v. Fed. Exp. Corp.*, 2:19-cv-06106-MAK, Dkt. 27 ¶ 46 (E.D. Pa.) ("at least" 843 days of military leave from 2004 through 2010); *Huntsman v. Sw. Airlines, Co.*, 4:19-cv-00083-PJH Dkt. 1 ¶ 44 (N.D. Cal.) ("dozens" of periods of short-term military leave from 2012 through 2018).

4302(3). And as the Court explained in *United States Forest Service v. Cowpasture River Preservation Association*, 2020 WL 3146692 (U.S. June 15, 2020)—decided on the same day as *Bostock*—"when Congress wishes to alter the fundamental details of a regulatory scheme," it must speak "with the requisite clarity to place that intent beyond dispute." *Id.* at *8.[8] Indeed, the Supreme Court had already instructed Congress that if it "wanted to impose an additional obligation upon employers, guaranteeing that employee-reservists have the opportunity to … earn the same amount of pay that they would have earned without absences attributable to military reserve duties, it [should do] so expressly." *Monroe*, 452 U.S. at 564. Congress did so expressly for federal employees. *See* 5 U.S.C. § 6323; *infra* Part II.A.2. That Congress did not do so expressly for all employees renders Plaintiff's interpretation implausible.

Plaintiff's interpretation is particularly implausible because, under his view, Congress silently left something as important as paid military leave to the whims of state and local legislative determinations about paid jury duty or paid sick leave. Under Plaintiff's theory, employers operating in jurisdictions with *any* paid leave requirement would be forced to offer paid military leave, but employers operating in jurisdictions without such requirements could choose to rescind paid leave policies if they are unable to afford paid military leave. Employers with nationally uniform

[8] Another major difference between this case and *Bostock*, of course, is the direct conflict between Plaintiff's reading of USERRA and 5 U.S.C. § 6323. *See infra* Part II.A.2.

policies (like many members of *amici*) would also face the difficult choice of either forgoing their uniform policies or providing *every* employee in *every* state with paid military leave.[9] Congress would not have adopted such a substantial change in the law without saying so, and it certainly would not have made an issue as important as paid military leave contingent on state and local legislation about a different subject altogether.

2. *Plaintiff's Position Conflicts Directly With The Federal Paid Military Leave Scheme*

Plaintiff's interpretation would also create an irreconcilable conflict with Congress's express scheme providing paid military leave to federal employees. *See* 5 U.S.C. § 6323.

Because USERRA is generally applicable to the federal government, *see* 38 U.S.C. § 4303(4)(A)(ii), virtually any service member who works for the federal government is protected by both 5 U.S.C. § 6323 and USERRA. Section 6323(a), in turn, provides federal employees called up to "active duty," "inactive-duty training," "funeral honors duty" or "field or coast defense training" with 15 days of paid military leave per year, with no offset for military pay. Section 6323(b) provides an

[9] Plaintiff's interpretation would also nullify employer policies that provide "a fixed number of days of paid military leave per year," 20 C.F.R. 1002.7(d), as is the case, for example, in some American Airlines work groups. Under Plaintiff's theory, so long as an employer provides paid civilian leave, it must also pay an employee's regular wages during however many days of short-term military leave a reservist takes, thus eviscerating any cap.

additional 22 days of paid military leave for contingency operations, but this pay is offset by military pay.

If Plaintiff's interpretation of USERRA were correct, then the entire scheme outlined in § 6323 would be superfluous. For more than half a century, the federal government has provided the same employees covered by § 6323 with paid jury duty and sick leave. 5 U.S.C. §§ 6322, 6307. So under Plaintiff's theory, those same employees would be entitled to paid military leave under USERRA, rendering superfluous Congress's previous grant of military leave in § 6323.

Plaintiff's reading is also irreconcilable with Congress's decision to provide no more than 15 days of paid military leave in normal circumstances and an additional 22 days for contingency operations (with an offset for military pay). For example, if a federal employee took 30 days of short-term military leave for training in one year, USERRA would entitle her to 30 days of paid military leave under Plaintiff's theory. If that employee instead took more than 50 days of short-term military leave (like the plaintiffs in some of the other paid military leave cases against the airlines, *supra* n.7), then (under Plaintiff's theory) she would be entitled under USERRA to paid military leave that exceeds *both* the 15-day cap for normal circumstances *and* the 22 additional days that Congress provided for contingencies, with no offset for military pay. The reading Plaintiff asks this Court to adopt would simply erase these express limits, and thus depart dramatically from the pre-USERRA federal military leave scheme that Congress enacted, and that Congress has continued to modify, *see* United Br. 31.

Plaintiff's construction thus runs into several established principles of statutory interpretation. One is that Congress does not make drastic changes to existing regulatory schemes silently. Another is the rule against superfluity. *See Corley v. United States*, 556 U.S. 303, 314 (2009). And a third is "that the more specific controls over the general," *Central Commercial Co. v. Commissioner*, 337 F.2d 387, 389 (7th Cir. 1964), a rule that applies with special force when "Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions," *RadLAX Gateway Hotel, LLC. v. Amalgamated Bank*, 566 U.S. 639, 645 (2012) (quotations omitted). The specific problem here is paid military leave, and Congress's specific solution is the comprehensive scheme in § 6323. Again, had Congress wanted to provide paid military leave for all service members, it could have and would have done so. Or if Congress wanted to provide unlimited paid military leave to federal employees, it could have and would have done that too. But there is "no indication that Congress intended to blot out the military leave statutes when it passed USERRA," and this Court should not, absent a clear congressional statement, adopt a construction that "mandates federal agencies to provide employees with unlimited military leave, irrespective of the detailed statutes granting federal employees specific periods of leave for training or active duty." *Butterbaugh v. Dep't of Justice*, 336 F.3d 1332, 1336 n.3 (Fed. Cir. 2003).

3. *Plaintiff's Position Would Impose Substantial New Costs On States And Municipalities*

Plaintiff's construction of USERRA would also impose substantial new liability on states and municipalities, directly contrary to the rule "that Congress will not implicitly attempt to impose massive financial obligations on the States." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 16-17 (1981). That is because USERRA applies to states and local government employers in the same manner as to private and federal employers, *see* 38 U.S.C. § 4303(4)(A)(iii), and many states and localities provide paid civilian absences like paid jury duty leave. Thus, for those jurisdictions that do not currently provide paid military leave, Plaintiff's interpretation would create a massive new liability, straining already-thin budgets. And Plaintiff's reading would render superfluous the numerous state laws that expressly grant state employees paid military leave—laws enacted precisely because states understood that "USERRA does not address payment during military leave." Samuel W. Asbury, *A Survey and Comparative Analysis of State Statutes Entitling Public Employees to Paid Military Leave*, 30 Gonz. L. Rev. 67, 72 (1994).

B. The Lack Of Legislative History On A Drastic New Paid Military Leave Requirement Confirms That Congress Did Not Intend Plaintiff's Reading

Given the substantial practical effect and departure from the then-existing legal rules that would have resulted from Plaintiff's interpretation, one would have expected not only a clear textual statement adopting that interpretation but also substantial controversy and debate about it. At the very least, someone presumably

would have mentioned paid military leave in the legislative history if such a change was contemplated. But here again, there is only silence. And the legislative history that does exist affirmatively precludes Plaintiff's reading.

1. As the Supreme Court has recognized on numerous occasions, Congress is unlikely to effect a "major change" in the law without "at least some discussion" indicating that the change was intended. *Dewsnup v. Timm*, 502 U.S. 410, 419 (1992); *see United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 380 (1988) (major change "would not likely have been made without specific provision in the text of the statute," and it is "most improbable that it would have been made without even any mention in the legislative history"); *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979) (silence of legislative history "is most eloquent, for such reticence while contemplating an important and controversial change in existing law is unlikely"); *infra* Part III (discussing *Fishgold*'s application of this principle).

This principle applies fully here, given the radical change from prior law that Plaintiff's interpretation would represent. But "[t]here is no suggestion in any of the hearings or debates before Congress that a change from the prior law in this area was intended" or even contemplated. *Gooding v. United States*, 416 U.S. 430, 457 (1974). There is not a single statement from a Member of Congress suggesting that private employers would now be required to provide paid military leave if they provide paid civilian leave. Nor is there a statement recognizing that the federal government would now be required to provide unlimited paid military leave because

it provided paid jury duty and sick leave. It is simply implausible that "such a significant change as that proposed by [Plaintiff] to have entirely escaped notice." *Id*. at 457-58.

2. Indeed, the legislative history is not merely silent as to Plaintiff's theory but affirmatively refutes it.

a. For starters, Plaintiff's construction is inconsistent with *Waltermyer* for the reasons already explained. *See supra* Part I. The legislative history makes clear that Congress intended to adopt *Waltermyer* but there is no indication that Congress intended to expand that holding, which is what Plaintiff's construction would require.

b. The legislative history also affirmatively refutes any construction—like Plaintiff's—that would impose substantial new costs on private and public employers.[10]

For example, the Senate Report accompanying USERRA explained "that the enactment of USERRA would impose no new economic burdens on employers" and "would not entail any significant new regulation of … businesses." 70 Fed. Reg. 75,246, 75,291-92 (Dec. 19, 2005) (citing S. Rep. No. 103-158, at 82, 85 (1993)). That would not be true if every employer who provides civilian paid leave would suddenly be required to provide military leave.

[10] In the absence of any direct legislative history, Plaintiff's effort "to divine messages from congressional commentary directed to different questions altogether" is "a project that threatens to substitute the Court for the Congress." *Epic*, 138 S. Ct. at 1631 (quotations and alterations omitted).

Similarly, the Senate Report concluded, based on a Congressional Budget Office study, that USERRA would increase the federal budget by only $1 million a year, which it attributed exclusively to additional contributions to "government matching funds" for Thrift Savings Plans. S. Rep. No. 103-158, at 83-84. But if, as Plaintiff contends, USERRA imposed a new paid military leave obligation on the federal government because it provides, for example, paid jury duty leave, then this calculation would be dramatically wrong. This "enormous discrepancy" between the Senate's understanding and Plaintiff's construction further "indicates that Congress never envisioned" the paid military leave requirement that Plaintiff advances. *Gay v. Sullivan*, 966 F.2d 1124, 1129 (7th Cir. 1992); *see also, e.g.*, *Thompson v. Kennickell*, 797 F.2d 1015, 1025 (D.C. Cir. 1986).

Likewise for state and local employers. The Senate Report found that USERRA "would not affect the budgets of State and local governments" at all, S. Rep. No. 103-158, at 82, which could not possibly be true if Plaintiff were correct, because state and local governments are also subject to USERRA and employ roughly one in six reservists.[11]

[11] *See, e.g.*, Susan M. Gates, et al., *Supporting Employers in the Reserve Operational Forces Era*, Rand National Security Research Division (2013), at xix & 44, https://www.rand.org/content/dam/rand/pubs/research_reports/RR100/RR152/RAND_RR152.sum.pdf; *The Effects of Reserve Call-Ups on Civilian Employers*, CBO (May 2005), at 8, https://www.cbo.gov/sites/default/files/109th-congress-2005-2006/reports/05-11-reserves.pdf.

The lack of any statement in the legislative history supporting Plaintiff's theory is good reason to reject it. The fact that the legislative history affirmatively contradicts Plaintiff's reading only confirms the point.

C. The Lack Of Stakeholder Commentary On A Drastic New Paid Military Leave Requirement Further Defeats Plaintiff's Reading

The major stakeholders affected by Plaintiff's theory also never mentioned the possibility that § 4316(b) was intended to adopt Plaintiff's construction, let alone supported (e.g., labor unions) or objected to (i.e., employers) the substantial change in law that Congress supposedly enacted. In fact, stakeholder behavior even after USERRA was enacted is strong evidence that no one understood USERRA to impose the kind of obligation that Plaintiff says it does.

a. Had Congress actually adopted Plaintiff's rule, it would have a dramatic effect on employers, as explained above. *Supra* at 11-13. The airlines, for example, disproportionately employ pilot reservists, who earn generous salaries and also take significant amounts of military leave on an annual basis. It thus comes as no surprise that *all* of the USERRA paid military leave class actions filed in the past few years have been against air carriers. Nor is the cost to employers strictly monetary. Because private employers cannot limit the amount of military service an employee performs, Plaintiff's rule would create a new incentive to take additional military leave (i.e., double pay), which would present a threat to business continuity.

Given these effects, businesses and labor unions surely would not have remained silent if anyone had understood the statute the way Plaintiff does.

Amici's members, and air carriers in particular, would have been opposed to such a rule for many of the reasons just discussed. The same would be true of any employer that employs a significant number of reservists, or any small business that can ill afford to pay a reservist for not working over an extended period of time. And *amici*, as leaders in the business community, at the very least would have studied the issue carefully had there been any notion that paid military leave would be required of their members. On the other side of the issue should have been labor groups and unions arguing in favor of the adoption of a new paid military leave requirement. But in fact, not one of these stakeholders so much as mentioned paid military leave because everyone understood that paid military leave was not required. *See, e.g.*, *Coleman v. Interco Inc. Divs.' Plans*, 933 F.2d 550, 552 (7th Cir. 1991) ("[I]n the event that [Congress's] hypothesized intention had been expressed, the legislative history would probably contain a record of protest from the business community against such a disruption of established and economical methods of doing business.").

b. This common understanding is reflected in collective bargaining in the years following USERRA's passage. As Congress was well aware, benefits for unionized employees in the airline industry (which constitutes the vast majority of airline employees) are collectively bargained pursuant to the Railway Labor Act, 45 U.S.C. § 151 *et seq*. And *amici*'s member carriers bargained with unions representing their flight crews over whether and how much paid military leave to provide even after USERRA was passed. At American, for example, the Allied

Pilots Association voluntarily bargained away a preexisting paid military leave benefit in exchange for substantial "cost savings" that were used to secure other benefits for pilots.[12] Yet none of this bargaining would have happened if either side believed that federal law *required* paid military leave by virtue of the fact that the carriers also provided other types of paid absences.

And it is not just private employers who, under Plaintiff's interpretation, were in the dark—federal stakeholders also have never shared that interpretation. The Department of Labor, which administers USERRA, has concluded that differential pay—i.e., the difference between a reservist's military and civilian wages—is "neither required by nor addressed in USERRA." 70 Fed. Reg. at 75249; *see also* 20 C.F.R. § 1002.7(d).[13] But that would not be true under Plaintiff's theory—because many employers offer differential pay during jury-duty leaves (i.e., the difference between the employee's regular wages and the jury-duty stipend), they would be required under USERRA to offer differential pay during military leave as well.

Meanwhile, the Office of Personnel Management, which maintains the federal government's leave policies, instructs that the only type of paid military leave available to federal employees is that provided expressly in 5 U.S.C. § 6323,

---

[12] *See Scanlan v. Am. Airlines Grp.*, No. 2:18-cv-04040, ECF 98 at 21 (E.D. Pa.).

[13] There is also nothing about paid military leave in the USERRA rights posters that DOL provides to employers to satisfy their obligations under 38 U.S.C. § 4334. *See Your Rights Under USERRA*, U.S. Dep't of Labor (April 2017), https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Private.pdf.

even though the federal government would have to provide additional paid military leave under Plaintiff's theory.[14] *See supra* Part II.A.2; *see also White*, 416 F. Supp. 3d at 739 (noting that the Department of Justice has recognized that "USERRA requires only an unpaid leave of absence" (quotations omitted)).

On Plaintiff's theory, every major stakeholder affected by his reading of the statute—not to mention every member of Congress—simply missed the fact that Congress was drastically altering the existing regulatory scheme by enacting § 4316(b). That is as wrong as it sounds.

III. PLAINTIFF'S CONTENTION THAT USERRA SHOULD BE INTERPRETED IN A REFLEXIVELY PRO-EMPLOYEE MANNER IS MISTAKEN

This Court should also reject Plaintiff's suggestion that USERRA should be reflexively construed in a pro-employee manner. In Plaintiff's telling, the pro-veteran canon is something like a super-clear statement rule that trumps all others, such that "United must show that it has the *only* plausible interpretation" of the statute notwithstanding all the other rules of construction. White Br. 17-18. There is no statutory ambiguity here at all, but this Court in any event has never read the pro-veteran canon in the way that Plaintiff suggests. *See, e.g.*, *Gross*, 636 F.3d at 889-90; *Bowlds v. Gen. Motors Mfg. Div. of Gen. Motors Corp.*, 411 F.3d 808, 812

[14] *See Pay & Leave*, OPM, https://www.opm.gov/policy-data-oversight/pay-leave/pay-administration/fact-sheets/military-leave/.

(7th Cir. 2005); *McGuire v. United Parcel Serv.*, 152 F.3d 673, 676-78 (7th Cir. 1998). Nor has any other court.

Rather, the pro-veteran canon is a tool of last resort—it "is only applicable after other interpretive guidelines have been exhausted." *Nielson v. Shinseki*, 607 F.3d 802, 808 & n.4 (Fed. Cir. 2010). Thus, courts hold that "the canon of statutory construction in favor of veterans must … yield" to clear statement rules. *Smith v. Principi*, 281 F.3d 1384, 1388 (Fed. Cir. 2002); *see also Nat'l Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 809 F.3d 1359 (Fed. Cir. 2016) (rejecting argument that pro-veteran canon trumps *Chevron*). It is easy to see why. As the federal government has explained, "[a]side from linguistic canons that apply rules of syntax to statutes, the most decisive canons take the form of 'clear statement rules,' which 'ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation.'" En Banc Brief for Respondent-Appellee, *Procopio v. Wilkie*, No. 2017-1821, 2018 WL 5801188, at *46 (Fed. Cir. Oct. 31, 2018) (quoting *Sossamon v. Texas*, 563 U.S. 277, 291 (2011)). The pro-veteran canon, by contrast, is an interpretive tie-breaker for when all other interpretive rules fail.

This makes sense. After all, USERRA (as with every other statute) does not "pursue[] its stated purpose at all costs." *Henson v. Santander Consumer USA, Inc.*, 137 S. Ct. 1718, 1725 (2017) (quotations and alteration omitted). Instead, it reflects a compromise. Although the statute is meant to benefit service members, "Congress carefully constructed" it also to account for the "legitimate concerns of employers."

Francis, 452 F.3d at 304-05; *accord Crawford v. Dep't of the Army*, 718 F.3d 1361, 1367 (Fed. Cir. 2013). And because USERRA was carefully designed to "strike an appropriate balance between benefits to employee-service persons and costs to employers," courts are not free to "restrike that balance" in favor of reservists. *Rogers v. City of San Antonio*, 392 F.3d 758, 770 (5th Cir. 2004).

One need look no further than *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275 (1946)—the seminal case establishing the pro-veteran canon—to see why the canon does not help Plaintiff in this case. *Fishgold* is important because USERRA must be read consistently with "the large body of case law that had developed under" its predecessor statutes, 20 C.F.R. § 1002.2, and each case cited by Plaintiff, White Br. 17, traces its roots to *Fishgold*. Yet *Fishgold* unambiguously supports United.

The plaintiff in *Fishgold* was "laid off" from work as a welder and was not reassigned to other work, unlike more senior welders. 328 U.S. at 279-80. He claimed that these layoffs constituted a "discharge" in violation of USERRA's original predecessor statute, *id*. at 284-85, and thus that he was entitled to "compensation for the days he was not allowed to work," *id*. at 280. The Court ruled for the employer, and its decision clearly refutes Plaintiff's position.

To start, *Fishgold* confirms that the pro-veteran canon does not automatically trump in every case even where (unlike here) there is a potential ambiguity. The *Fishgold* Court noted, for example, that two federal agencies had offered conflicting interpretations, *id*. at 289-90, which means that reasonable government officials

could and did read the statute differently. Yet the Court found for the employer, notwithstanding the pro-veteran canon, because stronger interpretive tools supported that result, just as they support affirmance here.

Fishgold also confirms that the pro-veteran canon does not trump clear statement rules, especially where Congress has shown that it knows how to legislate directly. *Fishgold* rejected the plaintiff's interpretation in part because "when Congress desired to cover the contingency of a lay-off, it used apt words to describe it." *Id.* at 287. If Congress had intended to ensure work during a layoff, the Court reasoned, "we are bound to believe that it would have used a word of the kind which it had itself recognized as being descriptive of that situation." *Id.* The same is true here. When Congress wants to provide for paid military leave, "it knows exactly how to do so." *Epic*, 138 S. Ct. at 1626; *see* 5 U.S.C. § 6323(a); *supra* Part II.A.2.

Finally, *Fishgold* shows that the *absence* of any legislative history supporting a pro-employee construction can be evidence that this construction was not intended. In *Fishgold*, the Court "searched the legislative history in vain for any statement of purpose that the protection accorded the veteran was the right to work when by operation of the seniority system there was none." 328 U.S. at 289. Again, the same is true here. *No* legislative history supports the position that Congress intended to require paid military leave, and all the history that does exist is to the contrary.

Fishgold, in short, simply confirms the commonsense point that when Congress intends a substantial change in law, it does so expressly, and that when the statute lacks a clear statement and the legislative history is silent, Congress likely did not intend any such change. That is exactly the case here.

CONCLUSION

The decision below should be affirmed.

Dated: June 22, 2020

Respectfully submitted,

/s/ Anton Metlitsky

PATRICIA N. VERCELLI
RIVA PARKER
AIRLINES FOR AMERICA
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(202) 626-4000

Counsel for Air Transport Association of America, Inc., d/b/a/ Airlines for America

DARYL L. JOSEFFER
EMILY J. KENNEDY
U.S. CHAMBER LITIGATION CENTER
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the Chamber of Commerce of the United States of America

MARK W. ROBERTSON
ANTON METLITSKY
O'Melveny & Myers LLP
7 Times Square
New York, New York 10036
(212) 326-2000

JASON ZARROW
O'Melveny & Myers LLP
400 South Hope Street, 18th Floor
Los Angeles, California 90071
(213) 430-6005

Counsel for *Amici Curiae*

CERTIFICATE OF COMPLIANCE

The foregoing brief complies with the type-volume limitation of Circuit Rule 32(c). The brief contains 6976 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) and Circuit Rule 32(b) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2010 in Century Schoolbook 12-point font.

s/ Anton Metlitsky
Anton Metlitsky

CERTIFICATE OF FILING AND SERVICE

Pursuant to Federal Rule of Appellate Procedure 25, I hereby certify that on June 24, 2020, I electronically filed the foregoing Brief of Appellant via ECF, and service was accomplished on counsel of record by that means.

s/ *Anton Metlitsky*
Anton Metlitsky